IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

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:: O R D E R ::

Madan Lal Vs. Sunil Kumar & Ors.

S.B. CIVIL WRIT PETITION NO.6979/2005.

Date of Order :: 3rd July 2006.

PRESENT

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Manish Shishodia, for the petitioner.
Dr. Sachin Acharya, for the respondent No.1

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BY THE COURT:

The petitioner Madan Lal, having been declared elected as Sarpanch, Gram Panchayat, Utradabas, Tehsil Bhadra, District Hanumangarh in the elections held on 31.01.2005, is facing an election petition filed by the respondent No.1 Sunil Kumar challenging his election on the grounds of improper rejection and improper reception of some of the votes. The learned Civil Judge (Senior Division), Bhadra hearing the election petition, after evidence of the parties proceeded to pass an order on 22.09.2005 for

inspection of the ballot papers for the purpose of appreciation of evidence. The said order dated 22.09.2005 having been passed contrary to the requirements of law and without recording requisite satisfaction before ordering inspection of the ballot papers was set aside by this Court while allowing Writ Petition No.5855/2005 on 27.10.2005. Thereafter, the matter was taken up again by the learned Civil Judge (Senior Division), Bhadra and while framing two points for determination about moving of the application by the election petitioner for recounting before the Returning Officer and about prima facie case having been made out for inspection and recount, proceeded to hold on both the points in favour of the election petitioner and requisitioned the ballot papers for inspection and recount by his order dated 29.11.2005 (Annex.8) that is impugned in this writ petition.

Briefly put, the facts relevant for determination of the questions involved in this writ petition are that in the aforesaid elections held on 31.01.2005, there were seven candidates contesting for the office of Sarpanch, Gram Panchayat, Utradabas and as per undisputed facts the following are the particulars ad seriatim of the candidates and the number of votes polled by them:-

Sl. No.	Name of Candidate	Number of Votes Polled
01.	Jai Prakash	193
02.	Prakash	55
03.	Poonam Chand	170
04.	Madan Lal S/o Darshanand (petitioner)	490
05.	Madan Lal S/o Ram Lal	159
06.	Vikram Singh	115
07.	Sunil Kumar (respondent No.1)	488

Note : In all, 18 votes were rejected as invalid.

The present petitioner Madan Lal having polled 490 votes was declared elected, nearest rival being the respondent No.1 Sunil Kumar having secured 488 votes.

The respondent No.1 Sunil Kumar challenged the election of the petitioner fundamentally on two grounds: First, it was alleged that the Returning Officer improperly and arbitrarily rejected 18 votes. According to the election petitioner (respondent No.1), out of those 18 rejected votes, 10 were the votes polled in his favour and 8 ballot papers were carrying no seal and they were blank. It was alleged that at the time of scrutiny of the ballots papers, those 10 ballot

papers were kept aside as doubtful because of the reason that though each of the said vote was in favour of the election petitioner but because of wrong folding of the ballot paper, the original seal left its impression in the column of the other candidate Jai Prakash, or above. According to the election petitioner, such voters had not put any seal against the name of Jai Prakash or any other candidate and the original seal in anti-clockwise direction was in his column alone and at other place it was only an impression. The election petitioner has alleged that the Returning Officer had arbitrarily rejected those votes and they were his valid votes and ought to have been counted in his favour and upon such counting he was entitled to be declared elected. Secondly, it was alleged that the returned candidate was shown to have secured 490 votes but 5 of the votes counted in his favour were not valid votes as 3 of the ballot papers were carrying only thumb impressions and not the seal and in 2 ballot papers the seal was placed between the names of Madan Lal (petitioner) and Madan Lal son of Ram Lal and the intention of the voter was not clear; and all those 5 votes were liable to be rejected but were improperly counted in favour of the returned candidate. It has also been averred that the election petitioner made a request for scrutiny and recounting but the Returning Officer refused the same without any reason. On the grounds aforesaid, the

respondent No.1 (election petitioner) has sought the relief of declaration of the result of election of the present petitioner to be void and for inspection and recounting of all the ballot papers and for declaring him as elected.

The present petitioner has put the election petition to contest and the averments of the election petitioner have been denied as incorrect and baseless. The petitioner has submitted that 18 votes were rightly rejected and has proceeded to explain that out of the 18 rejected votes, 1 ballot paper was not carrying the seal for any candidate but the seal was placed at the top of the ballot paper carrying the name of place (Utradabas); that 2 ballot papers were absolutely blank; and that 1 ballot paper was carrying the seal in the column of the candidate but for its improper folding, the seal impression occurred at another place and hence it was rejected. Apart from this explanation about 4 ballot papers, the petitioner has stated that the remaining 14 ballot papers were carrying the seal against the name of two or more candidates and none of such seal was in reverse and all the ballot papers were shown to the candidates and their agents present and everyone accepted rejection of such votes and the ground urged by the election petitioner was totally baseless. The petitioner has also refuted the allegation of 5 votes counted in his favour to be invalid votes. It has been maintained that the election

petitioner never made any application in writing before the Returning Officer but for the reason that there were two candidates in the name of Madan Lal, to guard against any error, recount was definitely carried out in the presence of all the candidates and their agents and to their satisfaction. In the additional plea, the petitioner has contended that the election petitioner having not moved application in writing as contemplated by Sub-rule (6) of Rule 49 of the Rajasthan Panchayati Raj (Election) Rules, 1994 (for short 'the Rules') and having agreed to the election result is not entitled to seek recount and on the principles of estoppel the petition is liable to be rejected.

The following issues have been framed for determination of questions involved in the election petition;-

> "(1) क्या ग्राम पंचायत उतरादाबास के सरपंच पद हेतु हुए दिनांक 31.1.2005 के मतगणना के दौरान रिटर्निंग अधिकारी द्वारा नामन्जूर किये गये 18 मतों में से 10 मत प्रार्थी के वैध मत थे ?
> ---प्रार्थी
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> (2) क्या अप्रार्थी को 485 ही वैध मत प्राप्त हुए और उसे 5 मत अस्वीकार किये जाने योग्य को अवैध रूप से, वैध मत के रूप में गणना की गई ?
> ---प्रार्थी
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> (3) क्या प्रार्थी के विरूद्ध विबन्ध का सिद्धान्त लागू होता है ?
> ---अप्रार्थी
>
> (4) अनुतोष ?"

In evidence, the election petitioner has examined himself as AW-1 and his agent Satyadeo as AW-2. The petitioner has examined himself as NAW-1 and Mehar Chand as NAW-2. The election petitioner has also produced documentary evidence including a copy of the application allegedly moved before the Returning Officer for recounting as Exhibit-2.

As noticed at the outset, after evidence of the parties, the learned Civil Judge proceeded to pass the order dated 22.09.2005 (Annex.6) for inspection of the ballot papers and this Court on 27.10.2005 set the said order dated 22.09.2005 aside. This Court recorded the findings and made observations thus:

> "I considered the submissions of the learned counsel for the parties and perused the facts of the case. It is now well settled law that the election tribunal has power to order recounting of the votes and as per Rule 53 of the aforesaid Rules of 1994, the court also can order for production and inspection of the ballet papers. It is also settled law that secrecy of the ballet papers cannot be disturbed only on the basis of mere allegation levelled by the election-petitioner. Hon'ble the Apex Court in the case of Chandrika Prasad Yadav (supra) held that absence of explanation for not submitting the application for recounting at the time of the counting of the votes is a factor which may affect the prayer for accepting or rejecting the prayer for recount in the proceedings before the tribunal where the recounting is sought. Here in this case, the tribunal has not ordered for

> recounting of the votes but has ordered inspection of the ballet papers which also may affect the secrecy of the ballet papers. The tribunal could have reached to the conclusion on the basis of the evidence prima facie, that the petitioner submitted the application for recounting before the Returning Officer and on the basis of his oral evidence, he has made out a case for violating the secrecy of the ballet papers but in this case, the tribunal merely observed that it is difficult to assess oral evidence of both the parties and, therefore, the ballet papers are required to be inspected. If such plea be the ground for inspecting the ballet papers then that will be in all those cases when there are allegations in the election petition of wrongful rejection or acceptance of the ballet papers. The election tribunal failed to apply its mind on evidence for the purpose for drawing inference for ordering inspection of the ballet papers. Therefore, the order of the election tribunal cannot be allowed to stand."

After passing of Order dated 27.10.2005, the learned Civil Judge considered the matter over again and addressed to two questions: One, as to whether the election petitioner moved any application before the Returning Officer and second, as to whether he has been able to make out a prima facie case for inspection and recount for determination of the questions in controversy?

After considering the evidence on record, the learned Civil Judge proceeded to decide on point No.1 that prima facie there were sufficient grounds available to believe that the election petitioner did make an application for

recounting before the Returning Officer and has recorded the finding thus:

> "अत: प्रथम दृष्टया यह माने जाने के पर्याप्त आधार हैं कि रिटर्निंग अधिकारी के समक्ष पुन: गणना का आवेदन याची ने किया था।"

On the second point about prima facie satisfaction, the learned Judge examined the evidence on record and observed that normally recount is not to be ordered as a matter of course unless the election petitioner is able to make out a prima facie case for recounting of the ballot papers and unless it is necessary in the interest of justice. The learned Judge noticed the varying stands of the contesting parties and came to the conclusion that the election petitioner has been able to establish prima facie that for the purpose of effectual determination of issues, the ballot papers were required to be inspected and recounted. The learned Judge has recorded his findings and conclusions thus:

> "इस प्रकार मतगणना के दौरान याची की आपत्ति पुन: गणना करवाने की मौखिक रही हो या लिखित, जो कि लिखित होना याची ने प्रथम दृष्टया साबित किया है और दोबारा मतगणना याची या अयाची के कहने पर या याची सुनीलकुमार के एतराज के उपरांत रिटर्निंग अधिकारी द्वारा की गई हो, ऐसा नहीं पाया गया है. इस प्रकार प्रथम दृष्टया याची यह साबित करने में सफल रहा है कि पक्षकारान के मध्य विवाद बिन्दु के न्यायिक निस्तारण के लिए मतपत्रों को देखे बिना, उनकी पुन: गणना किये बिना, विरचित की गई विवाद्यकों का भलीभांति निस्तारण किया जाना सम्भव नहीं

है. और प्रथम दृष्टया न्यायहित में मतपत्र की पुन: गणना व अवलोकन किया जाना आवश्यक है, जिसको याची ने प्रथम दृष्टया साबित किया है."

Challenging the order dated 29.11.2005, the petitioner has urged: that the Tribunal has committed an error apparent on the face of the record and once this Court has ruled that even inspection of ballot papers may effect secrecy of the ballot and when this Court has found that no prima facie case was made out by the election petition, it was not open for the Tribunal to pass the very same order without recording any substantial finding and such an approach is clearly a jurisdictional error; that the impugned order does not record any prima facie finding of a reasonable election dispute nor any finding as to why evidence of the election petitioner should be believed to the exclusion of the evidence led by the present petitioner so as to enable the Tribunal to violate the secrecy of ballot papers; that no application as contemplated by Rule 49 (6) was made and the document Ex.2, said to be a copy of the application, is an engineered document that does not contain any endorsement and no order of recount could have been made on its basis; that merely narrow margin is not a valid ground for ordering inspection or recount; and that as per the findings of the Tribunal, if it were unable to proceed further on the basis of the evidence on record, the obvious

result ought to have been of dismissal of the election petition rather than permitting a roving and fishing inquiry. The petitioner has referred to the evidence and has contended that no case is made out in favour of the election petitioner.

Learned counsel Mr. Manish Shishodia appearing for the petitioner, while pressing the grounds aforesaid, has contended that so-called moving of the application before the Returning Officer is not established on record and the document Ex.2 is nothing but a manufactured document, having no endorsement of presentation. Learned counsel has contended with reference to Rule 49(6) of the Rules and the decisions of the Hon'ble Supreme Court in Ram Rati Vs. Saroj Devi & Ors. : (1997) 6 SCC 66, Chandrika Prasad Yadav Vs. State of Bihar & Ors.: (2004) 6 SCC 331 and Hoshila Tiwari Vs. State of Bihar & Ors.: (2005) 12 SCC 342 that the mandatory provisions of making application for recount having not been complied with and no explanation having been furnished for such non-compliance, the election petitioner was not entitled to seek recount. Learned counsel has also referred to the decision of the Hon'ble Supreme Court in M. Chinnasamy Vs. K.C. Palanisamy & Ors.: (2004) 6 SCC 341 to contend that merely for narrow margin, recount cannot be ordered. Learned counsel has contended with reference to the decision of the Hon'ble Supreme Court in Jitendra Bahadur

Singh Vs. Krishna Behari & Ors.: AIR 1970 SC 276 and the decision of this Court in Kripal Singh Vs. Darshan Singh & Ors.: 1986 WLN (UC) 202 that an order for inspection of ballot papers or recount of votes can only be passed if two conditions are satisfied that the election petition contains adequate statement of material facts and the Tribunal trying the petition is prima facie satisfied that to do complete justice between the parties and to decide the dispute, inspection of the ballot papers is necessary. Learned counsel has further contended that neither the election petition contains material particulars nor the learned Judge has reached any positive finding and recount has been ordered as a matter of course by simply reproducing the text of the evidence without analysing the same and that has resulted in jurisdictional error that would go long way to violate the secrecy of ballots and, therefore, the impugned order deserves to be set aside.

Per contra, learned counsel Dr. Sachin Acharya appearing for the respondent No.1-election petitioner has contended that by way of pleadings and evidence, the election petitioner has established that he did move an application for recounting but the same was not taken into consideration by the Returning Officer; and that Rule 49(6) of the Rules is only directory and no consequences are provided for not filing of the application and nothing much turns upon the contention of

present petitioner about the alleged want of such application. Learned counsel has further submitted with reference to the decision in Chandrika Prasad Yadav (supra) that the Hon'ble Apex Court has held that an application for recounting could be made before or after declaration of the result and if not so made, then the election petitioner is required to furnish sufficient explanation but in a given case prayer for recount before the Election Tribunal cannot be rejected merely for want of application before the Returning Officer. Learned counsel has pointed out that the decision sought to be relied upon by the petitioner in Ram Rati's case (supra) has already been over-ruled by the Hon'ble Apex Court in Sohan Lal Vs. Babu Gandhi and others: (2003) 1 SCC 108. Learned counsel, while agreeing with the submissions that recounting could be ordered upon statement of material facts in the election petition and upon prima facie satisfaction of the Tribunal that such an order was required to be made in order to decide the dispute and to do complete justice between the parties, has submitted that in the present case the election petitioner has precisely averred each and every material fact and by way of evidence has been able to make out a prima facie case for recount and the Tribunal has also recorded a categorical finding to that effect after considering the pleadings of the parties and the evidence led. Learned counsel has also

referred to the decisions of the Hon'ble Supreme Court in Ram Sewak Yadav Vs. Hussain Kamil Kidvai and others: AIR 1964 SC 1249, N.E.Horo Vs. Leander Tiru and others: AIR 1989 SC 2030, Bashir Ahmad Vs. Ghulam Quadir Mir and others: (1977) 1 SCC 285, I.Vikheshe Sema Vs. Hokishe Sema : (1996) 4 SCC 53 and of this Court in Amarjeet Singh Vs. Shri Sampuran Singh : 1991(2) WLC 188. Learned counsel has also submitted with reference to the decision of the Hon'ble Supreme Court in Chanda Singh Vs. Choudhary Shiv Ram Verma and others : (1975) 4 SCC 393 that when the margin is narrow and thin, as in the present case of 2 votes only, and when specific case has been made out of improper rejection and improper reception of votes, the Tribunal has not committed any jurisdictional error in ordering recount and the impugned order calls for no interference. Learned counsel for the election petitioner has submitted in the alternative that in any case, the election petitioner has precisely made out a case for inspection and recounting of disputed ballot papers and to that extent the impugned order deserves to be maintained.

Submissions of learned counsel for the parties have been given thoughtful consideration and the entire record has been scanned through.

The submission of the petitioner that this Court found on the earlier occasion while passing the order dated 27.10.2005 that no prima facie case was made out is not a correct reference to the purport and effect of the order passed by this Court. In the earlier writ petition, this Court was concerned with the order dated 22.09.2005 (Annex.6) passed by the learned Civil Judge and the said order was obviously made contrary to the requirements of law without recording any prima facie finding on the relevant questions and, therefore, this Court set the said order aside but with clear observations that the Tribunal could have reached to the findings prima facie on the basis of evidence and the Tribunal failed to apply its mind on evidence for the purpose of drawing inference for ordering inspection of ballot papers. This Court had no occasion to examine the evidence on record nor any finding has been recorded on the value and worth of the evidence nor that was the subject matter of the said writ petition.

The learned Civil Judge has taken up the matter after passing of the order by this Court and has framed two points for determination as noticed supra on the questions as to whether the election petitioner did move an application before the Returning Officer and as to whether the election petitioner has been able to establish prima facie that

inspection and recounting of the ballot papers was necessary in the interest of justice and for effectual determination of the dispute?

The learned Judge has recorded finding on point No.1 as noticed above that the election petitioner did move such application before the Returning Officer. The decision of the Hon'ble Supreme Court in Ram Rati's case (supra) laying down that when no such application was made, recount cannot be ordered has already been overruled by the Hon'ble Supreme Court in Sohan Lal's case (supra). Moreover, in the present case, the petitioner has been found to have prima facie established that he did move an application for recount and this Court is of opinion that such prima facie finding calls for no interference at this stage as the same has been reached on the basis of material on record particularly with reference to the copy of application (Ex.2).

On the second question about prima facie case, the learned Judge has taken note of the pleadings and the entire evidence on record and has thereafter noticed that in relation to 18 rejected votes, the case of the election petitioner is about the seal having been put in his column in 10 ballot papers but impression having occurred at other place because of wrong folding whereas the case of the present petitioner in relation to these 18 rejected votes is that 14 ballot papers

carried seal against the name of two or more candidates, his 1 vote was rejected because of wrong folding of the ballot paper and the impression occurring in other column, 2 were absolutely blank and 1 ballot paper was having the seal at the name of the place. Learned Judge has also noticed the case of the election petitioner about 5 votes counted for the returned candidate, that 3 of them were carrying thumb impressions and 2 were having seals in between the names of Madanlal son of Darshanand and Madanlal son of Ramlal. In the aforesaid view of the matter, learned Judge has found that the election petitioner has been able to make out a prima facie case for inspection and recount.

It is true that at mere askance recount cannot be ordered; and as repeatedly held by the Hon'ble Supreme Court, recount and inspection of ballot papers cannot be ordered as a matter of course but then requirement of law remains that there ought to be a prima facie case, material facts ought to have been pleaded and a fishing and roving enquiry would not be made while directing recount of votes. At the same time it is also true that when the Tribunal is prima facie satisfied on relevant considerations that in order to decide the dispute and to do complete justice between the parties, inspection and recount is necessary, it could be ordered. In the present case, the election petitioner has taken

specific pleadings in the election petition particularly about 10 rejected votes that seal was put in the column meant for him and only a wrongful folding had created impression at other place but anti-clockwise direction of the seal was in his column. The present petitioner while defending the election petition has stated that out of the 18 rejected votes, 14 ballot papers were carrying seals at two places; that 1 of them was cast in his favour but impression occurred at other place, 2 were blank and 1 was carrying seal at the name of the place. In view of such assertion of facts by the parties, having regard to very narrow margin of 2 votes between the petitioner and the respondent No.1, this Court is satisfied that in the present election petition a case for inspection and recount, at least to the extent of disputed votes, is made out.

It is also true that on mere narrow margin of votes, recount cannot be ordered but when the election petitioner has been able to make out a prima facie case of likelihood of improper rejection of votes and the case set up by the returned candidate also gives rise to more questions, this Court is clearly of opinion that to do complete justice between the parties, inspection and recount in relation to the disputed votes seems proper. As observed by the Hon'ble Supreme Court in Chanda Singh's case (supra), when the lead is relatively little, the stage is set for recount given some plus

point of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting.

The submission of the petitioner that on the findings of the Tribunal, if it were unable to proceed further on the basis of evidence on record, the election petition ought to have been dismissed, is not correct. The finding of the Tribunal is that the election petitioner has been able to establish that the issues could not be effectually determined without examination of the ballot papers and their recount and, therefore, a prima facie case for recount is made out.

However, having examined the findings of the learned Civil Judge and the case set up by the election petitioner, this Court is constrained to observe that though entering into the same arena over again, after the order passed by this Court on 27.10.2005, the learned Judge has yet not examined the law applicable to the case; and after considering the case of the parties regarding 18 disputed rejected votes and 5 disputed votes counted in favour of the petitioner, has not limited the order in relation to the disputed ballot papers only and has ordered as if all the ballot papers of the said election are to be put to recount. Such an uncertain order neither serves the cause of justice nor could be approved.

Having regard to the questions involved in the case, this Court is clearly of opinion that only the disputed ballot papers ought to be perused and considered and it is not a case where the entire counting is to be taken up over again. The inspection and recount is made for the purpose of determination of the questions arising in the election petition and else it is not as if the Tribunal is to examine a document or to enter into a review of the entire counting. The learned Judge has apparently not considered the sacred nature of the ballot papers carrying the wish of the electorate and has failed to consider that the secrecy of ballot is sacrosanct and is permitted to be violated only when and to the extent interest of justice demands and else the election petition is not meant for simply seeking recount on mere allegations. In the present case, recount to the limited extent is countenanced particularly in view of the case set up by the present petitioner, returned candidate himself but having regard to the overall circumstances of the case, the impugned order is required to be modified to remain limited in relation to the disputed ballot papers only and not beyond.

As a result of the aforesaid, though the challenge to the order dated 29.11.2005 is not accepted, however, this writ petition is allowed in part to the extent of modifying the order dated 29.11.2005 that it shall remain limited to the

disputed ballot papers only; and only those disputed ballot papers shall be inspected and recounted by the learned Civil Judge and then issues shall be determined in accordance with law. No costs.

(DINESH MAHESHWARI), J.

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